

Tentative Rulings for January 17, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

11CECG01433 *Fresno RV, Inc. v. Paul Evert's RV Country* (Dept. 503)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

09CECG01076 *Serrano v. Selma Auto Mall* is continued to Thursday, January 24, 2013 at 3:30 p.m. in Dept. 403.

11CECG04261 *Eatherly v. Farkas* is continued to Thursday, January 24, 2013 at 3:30 p.m. in Dept. 403.

10CECG02305 *Rojas v. River Ridge Partners* is continued to Wednesday, January 23, 2013 at 3:30 p.m. in Dept.402.

12CECG03204 *Espinoza v. Godinez* is continued to Thursday, January 24, 2013 at 3:30 p.m. in Dept. 402.

12CECG00507 *Via Montana, LLC v. Kraemer* is continued to Thursday, February 14, 2013 at 3:30 p.m. in Dept. 502.

(Tentative Rulings begin at the next page)

(20)

Tentative Ruling

Re:

Citibank, N.A. v. Tumbiolo

Superior Court Case No. 12CECG01586

Hearing Date:

January 17, 2013 (Dept. 402)

Motion:

Plaintiff's Unopposed Motion for Summary Judgment

Tentative Ruling:

To grant summary judgment in favor of plaintiff. Code Civ. Proc. § 437c.

Explanation:

According to the uncontradicted evidence presented, defendant opened the credit account with plaintiff. Defendant ceased making payments, and the balance owed on the account is \$29,061.73. See Crum Declaration.

The essential elements of any common count include: (1) that defendant is indebted to plaintiff in a certain sum; (4) for some consideration from plaintiff (contract must be executed on plaintiff's side); and (3) defendant's indebtedness to plaintiff. 4 Witkin, Cal. Procedure (4th ed. 1997) §518, pp. 608-609. The common count for money lent or paid alleges the indebtedness "for money lent by plaintiff to defendant," or "money paid" or "expended" to or for the defendant. *Pleasant v. Samuels* (1896) 114 Cal. 34. The evidence presented satisfies these elements.

Plaintiff's burden of proof has been met, and the burden shifts to defendant to create a triable issue of fact. Code Civ. Proc. § 437c(p)(1). Having filed no opposition, defendant has not produced any evidence to raise a triable issue of fact, and summary judgment in favor of plaintiff must be granted.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 1/16/13
(Judge's initials) (Date)

[10]

Tentative Ruling

Re: **Carlos Leal Jr. v. City of Fresno**
Superior Court Case No. 11CECG00716

Hearing Date: Thurs., Jan. 17, 2013 (**Dept. 402**)

Motions: Defendant City of Fresno's
(1) Motion to Compel Plaintiff's Deposition and
(2) Motion to Compel Plaintiff and His Treating
Psychotherapist Jane Price-Sharp to Produce
Subpoenaed Documents

Tentative Ruling:

To GRANT. (CCP 2020.220, 2025.450.)

However deposition questions shall be limited to the time period from Jan. 1, 2007 through the present date. And Plaintiff and his psychotherapist Dr. Jane Price-Sharp need only produce subpoenaed documents or records generated from Jan. 1, 2007 through the present date.

Explanation:

Defendant City of Fresno moves to compel Plaintiff to answer deposition questions and to compel Plaintiff and his treating psychotherapist to produce documents relevant to his mental injury or emotional distress. The City of Fresno argues that by suing for emotional distress damages, Plaintiff has clearly put his relevant mental and emotional health history at issue.

Analysis

Defendant City of Fresno argues correctly that the psychotherapist-patient communication privilege does not protect communications concerning the mental or emotional condition of the patient, if the patient has waived the privilege by tendering those issues in litigation. (**Evid. Code 1016; In re: Lifschutz** (1970) 2 Cal.3d 415, 427.)

Furthermore, the right to privacy is not absolute, but may be abridged when there is a compelling state interest to ascertain the truth in connection with legal proceedings. (**In re: Lifschutz** (1970) 2 Cal.3d 415, 432 [patient waived privilege by initiating litigation that put his mental and emotion state at issue].)

But, in those situations where it is argued that a party waives protection by filing a lawsuit, the court must construe the concept of "waiver" narrowly and a compelling public interest is demonstrated only where the material sought is directly relevant to the litigation. (**Britt v. Superior Court** (1978) 20 Cal.3d 844, 858-859.)

Once plaintiff has put his mental or emotional state at issue, defendant has a right to make reasonable inquiries into any pre-existing conditions. "In the case at bar, plaintiff haled defendants into court and accused them of causing her various mental and emotional ailments. Defendants deny her charges. As a result, the existence and extent of her mental injuries is indubitably in dispute. In addition, by asserting a causal link between her mental distress and defendants' conduct, plaintiff implicitly claims it was not caused by a preexisting mental condition, thereby raising the question of alternative sources for the distress. We thus conclude that her mental state is in controversy. (**Vinson v. Superior Court** (1987) 43 Cal.3d 833 [good cause existed for medical and psychiatric exam of plaintiff who alleged intentional infliction of severe emotional distress, arising from sexual harassment, though her personal sexual history was not discoverable].)

Plaintiff's Mental or Emotional Health at Issue

The court finds that Plaintiff has placed his mental and emotional health at issue in this litigation. In his first cause of action, Plaintiff alleges that "As a legal result of defendants' conduct, Plaintiff has suffered AND CONTINUES TO SUFFER embarrassment, anxiety, humiliation, physical and EMOTIONAL DISTRESS, all to his damage in an amount according to proof." (Complaint at ¶ 15.) This language is realleged and incorporated into each of the successive causes of action.

In his discovery response to Special Interrogatory 7, Plaintiff stated: "Plaintiff was embarrassed and humiliated when he was advised he was no longer able to be a police officer. This emotional distress was ESPECIALLY GREAT since plaintiff had been performing all of his work related duties for a number of years without criticism of his work performance."

"When plaintiff was sent to CSU he was contacted by various officers who asked if he had done something wrong to be assigned to that job. Various staff members identified above advised plaintiff he was to remain in CSU while other persons advised plaintiff he was needed on various homicide cases, his attendance was required at press conferences and he received awards for his performance notwithstanding the City advising him he needed to retire."

"This constant tug-of-war and the unknown expressed by numerous people concerning plaintiff's abilities only caused further anxiety, humiliation, embarrassment and EMOTIONAL DISTRESS.

"On his last day of work, he was advised by Captain Carrasco that he needed to depart the premises and he was not to return. Plaintiff was so embarrassed he was unable to tell his fellow co-workers why he was leaving and was so deeply embarrassed he could not face his fellow officers which caused him to miss his retirement dinner. While plaintiff was at home pending retirement, he was advised he was chosen officer of the year by the Fresno Rotary Club. Plaintiff was additionally humiliated when he explained to his son that he was no longer an officer and as a result they had to move out of their home."

"Plaintiff believes that this has been the most difficult event in his life and the most devastating regarding his EMOTIONAL well being. Plaintiff did not just approach his police officer position as a job; it was his career, his life goal and a dream. Plaintiff provided over 15 years of service to the City of Fresno and it was taken away by a few sentences in a worker's compensation report by a physician who saw him only on a limited basis and who had never reviewed his ability to perform his job as an officer. Plaintiff repeatedly advised his superiors that he did not want to retire and that he could perform his job notwithstanding the opinion of the worker's compensation doctor. As a result of these events, plaintiff gained several pound, had digestive problems and FELT CONTINUOUSLY DEPRESSED."

Plaintiff's Opposition

In Opposition, Plaintiff argues that he is not seeking damages for SEVERE emotional distress. There are two problems with this argument. First, the allegations of Plaintiff's Complaint and Plaintiff's own discovery responses contradict this position. In his discovery responses, Plaintiff contends he has suffered emotional distress that was "especially great," that was "devastating," and that was "the most difficult event in his life."

Second, while the Complaint in **Lifshutz** did allege "severe mental and emotional distress", the cases cited by the parties do not expressly limit their holdings to cases involving only "severe" distress. On the contrary, the cases appear to apply generally where mental or emotion distress damages are at issue.

Relevant Time Period 2007 - Present

Plaintiff argues correctly that there is insufficient evidence before the court that his 2004 – 2006 consultations with the psychotherapist are relevant to this litigation. However, the court finds that plaintiff's mental health treatment from 2007 to the present are directly relevant to this litigation. This is because Plaintiff initiated his worker's compensation proceeding in 2007 and because he resumed treatment with Dr. Price-Sharps starting in 2009. (Rubin Decl. at Ex. M, Plaintiff's Depo at 16-17, 126-128.) And the treatment that plaintiff sought during the time period from 1/1/07 to the present is directly related to his allegations of mental and emotional distress that are the subject of this lawsuit.

City of Fresno's Reply

In his Opposition, Plaintiff relies heavily on the holding of **Tylo v. Superior Court** (1997) 55 Cal.App.4th 1379. In its Reply, the City of Fresno argues correctly that **Tylo** is distinguishable from the facts of this case. In **Tylo**, an actress had entered into a contract to appear on a television series. The contract included a clause allowing Spelling Entertainment to fire her based on any material change in her appearance. When she became pregnant, she was fired and she sued for employment discrimination, sex discrimination, breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation.

Finally, the City of Fresno argues correctly that the court of appeal in **Tylo** did permit discovery into sensitive matters that were closely related to the lawsuit – including (1) knowledge of the husband's ability to impregnate the actress, (2) the actress's attempts to become pregnant during the time she was negotiating the contract, (3) knowledge about her husband's vasectomy and/or its reversal, (4) her emotional state, and (5) whether the pregnancy was accidental.

Tentative Ruling

Issued By: JYH on 1/16/13
(Judge's initials) (Date)

(24)

Issued By: JYH on 1/16/13
(Judge's initials) (Date)

(20)

Tentative Ruling

Re:

City of Fresno v. Kirkland et al.

Superior Court Case No. 11CECG02499

Hearing Date:

January 17, 2013 (Dept. 501)

Motion:

Motion for terminating sanctions

Tentative Ruling:

To deny.

Explanation:

There is no indication that defendant has been given notice of the hearing date. The moving papers served on defendant gave notice of a 2/6/13 hearing date. At plaintiff's request, the hearing was subsequently advanced to 1/17/13. The court's 12/3/12 order setting the 1/17/13 hearing directed counsel for plaintiff to give notice. Nothing has been filed indicating that defendant has been given notice of the new hearing date as required by Code Civ. Proc. § 1005. The hearing cannot go forward without notice to defendant.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: M.B. Smith on 1/16/2013
(Judge's initials) (Date)

(18)

Tentative Ruling

Re: *Major Sekhon v. Jaswinder Kaur, et al.*
Case no. 11CECG03150

Hearing Date: **January 17, 2013 (Dept. 501)**

Motion: By defendants Kaur and Singh for summary judgment or adjudication as to each cause of action in the second amended complaint (SAC)

Tentative Ruling:

To deny pursuant to California Code of Civil Procedure (CCP) section 437c.

Explanation:

Evidentiary objections

Defendants object to the declarations of Avtar Singh and Sekhon. As to the declaration of Avtar Singh the court sustains defendants' objections to ¶s 2, 4, 5, and 6, but overrules the objections to ¶s 1 and 3. The court overrules each objection to the declaration of Sekhon.

1st cause of action for breach of oral contract (real property)

Defendants contend that the statute of frauds bars the 1st cause of action for breach of oral contract (real property). Pursuant to Civil Code section 1624(a)(1), leases of real property for the period of longer than one year are required to be in writing. When the parties to an oral contract that is not to be performed within one year have partly performed it, neither can avoid its obligations as to past transactions on the basis of the statute of frauds, and the contract is enforceable to the extent it has been performed. (*Macmorris Sales Corp. v. Kozak* (1968) 263 Cal.App.2d 430, 442; and *Roberts v. Wachter* (1951) 104 Cal.App.2d 271, 281.) Pursuant to Civil Code section 1624(a)(3), an agreement to sell real property or an interest in real property is invalid unless the agreement or some note or memorandum of it is in writing and subscribed by the party to be charged by his agent. Equity will enforce an oral contract for the sale of real property that has been taken out of the statute of frauds by part performance: mere payment of money is not enough, but taking possession in reliance on the oral agreement, if the possession is actual, visible, notorious, and exclusive so that it furnishes evidence of the agreement between the parties that is as good as a writing, is sufficient to take the agreement out of the statute of frauds. (*Francis v. Colendich* (1961) 193 Cal.App.2d 128, 130-131.) There is a triable issue of material fact over whether defendant paid rent for the purpose of leasing the Cleo property or for the purpose of selling it as an option to purchase.

The 4th and 5th causes of action involve the loan of 100k from plaintiff to defendant Kaur. The loan is based on an oral K where there is no writing. Thus defendants contend that the 2 year statute of limitations governing oral contracts in CCP section 339 bars the 4th and 5th causes of action. In overruling the demurrer to these causes of action in the first amended complaint (FAC) the court found that the FAC pled facts that show the causes of action are not time-barred. The relevant allegations in the FAC and the SAC are the same: paragraph 45 to 48 of the SAC state plaintiff demanded payment on 17k outstanding on August 8, 2011. There is no evidence offered to the contrary in connection with the present motion. As to the 4th and 5th causes of action, defendant does not meet its burden in demonstrating there are no triable issues of material fact. (*Aguillar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) As such, the burden does not shift to plaintiff. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

There is a triable issue of material fact as to whether defendant Kaur transferred the Myrtle property in Huron with fraudulent intent. Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer. (*Arnold Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1294.)

Tentative Ruling

Issued By: M.B. Smith on 1/16/2013
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***Christine Aguayo v. Cal. St. University Fresno Assn., Inc.***
Court Case No. 11CECG04030

Hearing Date: **January 17, 2013 (Dept. 501)**

Motion: Defendant's motion for Summary Judgment or in the Alternative,
for Summary Adjudication

Tentative Ruling:

To deny summary judgment and summary adjudication.

Ruling on evidentiary objections: To overrule Objections 1, 3, 4, and 5. To sustain Objection 2 only as to the sentence in plaintiff's declaration at page 3:15-17. To Overrule Objection 2 as to the remainder of Paragraph 5 of plaintiff's declaration.

Explanation:

Evidentiary Objections:

The plaintiff's declaration at Paragraphs 3 and 5 are not objectionable in the main. First, the statements of Erin Boele are covered by the hearsay exception for party admissions, since Ms. Boele was an authorized representative for defendant and, as plaintiff's supervisor she was certainly authorized by the entity defendant to speak to plaintiff on defendant's behalf regarding plaintiff's pregnancy and how this impacted plaintiff's job. [Evid. Code § 1222(a)]

Plaintiff establishes sufficient foundation to provide testimony of her conversations with Ms. Boele because she was personally present, and so has personal knowledge of what was said. As for the opinions she offers, plaintiff is not testifying as an expert, but as a layperson. Lay opinions may be offered that are 1) rationally based on the perception of the witness; and 2) helpful to a clear understanding of his testimony. [Ev.C. § 800] The rule "merely requires that witnesses express themselves at the lowest possible level of abstraction." [People v. Hurlic (1971) 14 Cal.App.3d 122, 127] The determination whether an opinion is "helpful to a clear understanding" of the witness' testimony is left to the trial court's sound discretion. [Paez v. Alcoholic Beverage Control Appeals Bd. (1990) 222 Cal.App.3d 1025, 1027]

Lay opinions based on personal observation may be admissible as to someone's mental state, for example: "He looked extremely upset," or "She seemed alert," or "They looked nervous." [People v. Manoogian (1904) 141 Cal. 592, 596-598] However, a lay witnesses may not give conjectural or speculative lay opinion. [People v. Thornton (2007) 41 Cal.4th 391, 429]

The statements at ¶4 and ¶5 of plaintiff's declaration describing the conversations (who said what) are relevant, have proper foundation, and are thus

admissible. The opinions offered as to Ms. Boele's reactions to plaintiff's statements are rationally based on plaintiff's perception, and are helpful to a clear understanding of the testimony. [Ev. Code 800] Thus, the statements that Ms. Boele was very quiet, that she "briskly" congratulated plaintiff, and that she did not seem sincere in her congratulations and that she "seemed upset" and was "not happy" about the pregnancy are all within the realm that an average layperson might reasonably perceive during a conversation. The opinions are offered as to how Ms. Boele's demeanor appeared to plaintiff. Finally, the plaintiff can offer her own opinion about the first conversation with Ms. Boele (that it was "very brief and awkward"). None of this testimony strays into being conjectural or overly speculative. However, the last statement plaintiff makes (at p.3:15-17, about what she understood Ms. Boele's comment to mean about what Ms. Boele wanted to do) is conjecture on plaintiff part, and thus the objection to that statement is sustained.

As for the statements made at ¶10 (the subject of Objections 4 and 5), these are statements made by plaintiff, and thus plaintiff's testimony about what she herself said are not hearsay.

Pregnancy Discrimination counts (First and Fourth causes of action):

When the employer seeks summary judgment, the initial burden rests with the employer to show that no unlawful discrimination occurred. [CCP § 437c(p)(2); see *Guz v. Bechtel Nat'l, Inc.*, *supra*; *University of So. Calif. v. Sup.Ct. (Miller)* (1990) 222 Cal.App.3d 1028, 1036] It does this first by showing that the employee's action has no merit (CCP § 437c(p)(2)). It may do so by evidence that either: 1) negates an essential element of the employee's claim; or 2) shows some "legitimate, nondiscriminatory reason" for the action taken against the employee. [See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202–203]

If the employer meets this initial burden, to avoid summary judgment the employee must produce "*substantial responsive evidence that the employer's showing was untrue or pretextual*" ... thereby raising at least *an inference of discrimination*. [*Hersant v. California Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 (emphasis added; internal quotes omitted); *University of So. Calif. v. Sup.Ct. (Miller)* (1990) 222 Cal.App.3d 1028, 1036]

A plaintiff's "suspicions of improper motives ... based primarily on conjecture and speculation" are clearly not sufficient to raise a triable issue of fact to withstand summary judgment. [*Kerr v. Rose* (1990) 216 Cal.App.3d 1551, 1564] But evidence showing facts inconsistent with the employer's claimed reasons tends to prove the employer's discriminatory intent. [*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735; *University of Southern Calif. v. Sup.Ct. (Miller)*, *supra*, 222 Cal.App.3d at 1039] "Pretext" does not require plaintiff to show discrimination was the *only* reason for the employer's action. It is enough that it was a *determinative factor*—i.e., that the action would not have been taken "but for" the discriminatory intent. [See *Ewing v. Gill Industries, Inc.* (1992) 3 Cal.App.4th 601, 612] The employee must offer or point to evidence raising a triable issue that would permit a trier of fact to find by a

preponderance of the evidence that intentional discrimination occurred. [*Guz, supra*, 24 Cal.4th at 357]

In determining whether these burdens were met, we must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing her evidence while strictly scrutinizing defendant's evidence. [*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856]

Plaintiff's conduct with the lost and found money could easily be found to be in bad judgment by the trier of fact, meriting some kind of discipline from her employer. Even plaintiff has to characterize it as a "misdeed." [See her Memorandum, p.4:16] She was clearly taking *something that was not hers*, and moreover it was property over which her employer had taken protective custody. Even if she honestly intended to repay the money, her decision to take the money (even if she calls it "borrowing") was ill-considered. It was kept earmarked in a safe to which only designated employees were allowed access. That money was not kept sitting in the safe as plaintiff's (or anyone else's) "temporary loan" fund. It did not belong to her. It was property for which she was accountable. *Even if* there was no formal accounting or tracking procedure for this money, and *even if* the money sat for years without being claimed, and *even if* (as plaintiff argues) it was not defendant's money either, it was still *not plaintiff's money to take*.

Furthermore, her attempt to dispute defendant's claim that she took it for her "personal use" (by arguing that she was using it to "make a contribution for a wedding gift") is without merit. She was using the money in the way *she* intended, as a substitute for her personal funds, so it was clearly for her "personal use," just as much as it would have been if she had taken (borrowed) the money to buy lunch.

Any jury would no doubt factor these points into its analysis. This conduct was, in short, of the sort that might reasonably result in some negative action by an employer once the employer learned of it. Thus, defendant has clearly met its initial burden of showing a legitimate, nondiscriminatory reason for terminating plaintiff's employment.

Thus, plaintiff must show that defendant's stated reason for firing her was pretextual and concealed a discriminatory motive. She can avoid summary judgment, by demonstrating "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's proffered reasons such that the trier of fact could find those reasons unworthy of credence. [*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004]

Here, plaintiff has presented sufficient evidence to raise an inference of discrimination. [*Hersant v. California Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005] "Pretext" does not require plaintiff to show discrimination was the *only* reason for the employer's action. It is enough that it was a *determinative factor*—i.e., that the action would not have been taken "but for" the discriminatory intent. [See *Ewing v. Gill Industries, Inc.* (1992) 3 Cal.App.4th 601, 612]

Plaintiff has presented evidence showing mitigating factors regarding the event of her taking of the money: that the amount taken was *de minimis*; that she viewed it as "borrowing" and thus had no objective intent to steal; that she made no effort to conceal what she was doing and in fact told her co-worker that she was taking the money; that she left a note saying she owed the money, and also told the co-worker she was doing this; that she made no attempt to deny what she had done when confronted about it. Presented with these facts, an employer might reasonably have characterized this event as something other than "theft," giving rise to the question on this motion of whether this was truly the defendant's assessment at the time (i.e., uninfluenced by concurrent circumstances with plaintiff).

Plaintiff further presents evidence that at least casts some doubt on whether such an act would truly have caused her employer to lose complete trust in her, such that termination was the only solution: she was responsible for accounting for millions of dollars each year, much of it in cash; she did the job for years with good practices and complete accuracy; by leaving the note she clearly was not trying to deceive her employer in doing what she did; there were no prior allegations of money missing and/or misused from her department; there had never been any other instances of plaintiff herself taking any other money or any other losses associated with money handling in that office. The fact that other employees were fired for theft does not present irrefutable evidence that defendant was merely following its prior (nondiscriminatory) practice with plaintiff. No detail was given about the circumstances with those other employees, so they may not even be comparable with the one involving plaintiff. On summary judgment the court must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing her evidence while strictly scrutinizing defendant's evidence. [*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856]

These factors cannot be considered in a vacuum, but must also be considered in the context of the timing of discovery of this issue. Plaintiff had only recently informed her supervisor, Ms. Boele of her pregnancy and her intention to take a leave of absence, and that she wanted to take a total of eighteen weeks' leave. According to plaintiff, Ms. Boele's reaction to this news was not positive. The first conversation was brief and awkward, and Ms. Boele was not happy and seemed upset. In the second conversation regarding how much leave plaintiff wanted to take, Ms. Boele made a vague and noncommittal response to plaintiff's suggestion that she would take 18 weeks of leave, with this leave being broken up into at least two portions, with the second portion perhaps involving intermittent leave. A jury could interpret this as meaning that Ms. Boele did not wish to allow this leave, or at least that length of leave (even if we disregard plaintiff's opinion or conjecture about what Ms. Boele meant by her response). Ms. Boele would be personally impacted by plaintiff's leave, and the possibility of having plaintiff go out on leave, come back and then go out again (and possibly intermittently, at that) would make the task of filling plaintiff's duties even more difficult. Construing plaintiff's testimony liberally, as we must, this provides context for how defendant dealt with disciplining plaintiff over taking the \$10 from the lost and found cash.

Then, the very morning Ms. Boele learned about the incident with the cash Ms. Lane had emailed plaintiff on the subject of her pregnancy leave. Thus, it is certainly reasonable to infer that this issue would have been some part of the discussion when Ms. Boele contacted Ms. Lane regarding the money and they discussed what should be done. The trier of fact could certainly so infer. It at least raises the question of whether or not the issue of plaintiff's request for pregnancy leave had any bearing and influence over how they dealt with the disciplinary issue regarding the cash. While the employer's true reasons for termination need not necessarily have been "wise or correct," that does not mean that the employer may "use the occasion as a convenient opportunity to get rid of its [pregnant] worker." [Bracket added; See *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 358, regarding its "older" workers, citing to *Matthews v. Commonwealth Edison Co.* (7th Cir. 1997) 128 F.3d 1194, 1195 regarding its "disabled" workers]

The facts, taken together, at least present a triable issue of material fact as to whether the employer's stated nondiscriminatory reason for firing plaintiff was in fact its true reason. The trier of fact might find that, given the whole of the circumstances, that it was more likely than not that defendant's decision to fire plaintiff had a discriminatory motive. Thus, summary adjudication of these causes of action is denied.

Failure to Accommodate Pregnancy Leave and Denial of Family Care Leave
(Second and Third Causes of Action):

The issue with these counts is whether or not plaintiff actually 1) requested an accommodation for her pregnancy under Gov. Code §12945(b)(1); or 2) requested Family Care Leave.

Defendant argues for both of these counts that plaintiff never asked for any accommodation or leave under the pertinent statutes before she was terminated. She notified the Association of her pregnancy and that she wanted to take leave. She met with the HR manager regarding her options, and the HR manager provided her with forms to fill out. Plaintiff never completed the paperwork to request leave before she was terminated. Regarding the pregnancy accommodation, she never submitted anything from her doctor saying she needed an accommodation or leave due to her pregnancy. Absent a request for leave or accommodation, they argue, no duty in the employer arises, so there can be no failure to accommodate and no denial of leave.

Furthermore, on Reply, defendant attempts to argue that plaintiff's declaration at ¶4, regarding her meeting with Nicole Lane to discuss maternity leave, is an attempt to refute her own deposition testimony. Defendant argues that at her deposition plaintiff made it clear that she was merely inquiring what steps she needed to take for a leave of absence, and that she never filled out the paperwork Ms. Lane gave her. Defendant argues that in plaintiff's declaration she attempts to "suggest" that she actually requested leave. Defendant points out that the deposition testimony governs and she cannot dispute it with her declaration on this motion. So, defendant concludes, plaintiff's declaration should be disregarded to the extent it attempts to establish that she requested maternity leave. [*D'Amico v. Board of Medical Examiners*

(1974) 11 Cal.3d 1, 22; *Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613]

However, this argument is not well taken. There is no contradiction between the deposition testimony and her declaration on this motion. Her deposition testimony establishes that she had the meeting with the HR officer in order to find out about how much time she was entitled to take. At this meeting her *intention to take the leave* was at least made clear enough that the HR officer gave *plaintiff the forms to fill out*. Plaintiff did not testify that she did not ask for leave at that time; she only testified that *she did not fill out the forms at that time* because she believed it was too early in the process to do so. Thus, her declaration does not contradict anything said at her deposition. She states at ¶4 that she met with Ms. Lane to “discuss my future maternity leave.” That is entirely consistent with her deposition testimony. She states (as she did at her deposition) that they discussed the paperwork she would need to complete and that Ms. Lane gave her the paperwork. She concludes the paragraph by stating that after this conversation she planned to take approximately 18 weeks of leave. She does not state that she *told Ms. Lane* that she intended to take 18 weeks. In short, the entirety of ¶4 may be considered. Both the deposition testimony and the declaration at ¶4 inform us that she made it clear to her employer that she *intended to take* maternity leave. The intention was made clear enough that her employer was already discussing how best to arrange the work load in her absence, including the hiring of temporary help.

To that end, it must be noted that no authority is cited for the proposition that a terminated employee cannot make a claim against the employer for improper denial of pregnancy leave benefits/rights where the employee had put the employer on notice that she intended to take these benefits (by obtaining the proper paperwork and notifying her direct supervisor of how much time she wanted to take and how she wished to take it) but where the termination occurred before the formal steps took place (i.e., the paperwork turn in) for arranging that planned leave.

In short, defendant presents no authority at all to support its contention that notice under the FMLA is only accomplished by the employee filling out the paperwork given to her by Human Resources and submitting it. Whether notice is sufficient under the California Family Rights Act (CFRA) is a question of fact. [*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1255] Under the FMLA, “[under FMLA, “[w]hat is practicable, both in terms of the timing of the notice and its content, will depend upon the facts and circumstances of each individual case” [*Manuel v. Westlake Polymers Corp.* (5th Cir. 1995) 66 F.3d 758, 764] Defendant concedes that plaintiff informed defendant of her pregnancy (a condition that qualified her for leave). Admissible evidence establishes that she made clear to her employer her intention to take a leave of absence starting shortly before her delivery.

The failure to give proper, timely notice to an employer can bar a claim under California or federal law that the right to family leave has been violated. [*McDanel v. Eastern Municipal Water District Board* (2003) 109 Cal.App.4th 702, 706] However, defendant provides us with no authority that in this case the notice given by plaintiff was not sufficient notice. “From commencement to conclusion, the party moving for summary judgment bears the burden of *persuasion* that there is no triable issue of

material fact and that it is *entitled to judgment* as a matter of law." [*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845] Defendant has not met its burden of production on either of these counts.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: M.B. Smith on 1/16/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 502

(19)

Tentative Ruling

Re: **Brad's Auto Body v. Adame**
Superior Court Case No. 08CECG00478

Hearing Date: January 17, 2013 (Department 502)

Motion: by plaintiff for summary judgment

Tentative Ruling:

To grant the motion and award damages as prayed for, except for attorneys' fees claimed as damages.

Explanation:

Plaintiff has shown there are no disputed issues of material fact and that plaintiff is entitled to a judgment on its claim for conversion, breach of fiduciary duty and imposition of a constructive trust as a matter of law. Defendant has failed to file any opposition to the motion and so has failed to submit any evidence creating a factual dispute. The court will award a judgment in favor of plaintiff in the sum of \$421,000. Attorneys' fees are not recoverable under Civil Code section 3336. (*Haines v. Parra* (1987) 193 Cal. App. 3d 1553, 1559.)

The costs incurred by plaintiff in bringing the matter are recoverable via a costs bill after judgment. Because the deficiencies at issue may be curable, this ruling is made without prejudice.

Plaintiff is ordered to submit a form of judgment for the court's signature.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 1/15/13.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: **Rodriguez v. County of Fresno**
Superior Court Case No.: 11CECG04358

Hearing Date: January 17, 2013 (**Dept. 502**)

Motion: Demurrer to, and motion to strike portions of, the first amended complaint by Defendants County of Fresno, Fresno County Sheriff's Department, Jose Diaz, and James Minenna

Tentative Ruling:

To take the demurrer and motion to strike off calendar, and to strike, sua sponte, the first amended complaint filed without leave of court on October 5, 2012.

Explanation:

Plaintiffs David Rodriguez and Marilyn Rodriguez, individually and as successors-in-interest to Richard James Rodriguez ("Plaintiffs"), did not obtain leave of court before filing the first amended complaint on October 5, 2012. Statutory law is clear that a pleading may be amended only once, "of course," [e.g., without permission of the Court], before the answer or demurrer is filed, or after demurrer and before the demurrer hearing. (Code Civ. Proc., § 472.) Here, an answer was filed on January 23, 2012, cutting off Plaintiffs' time to amend "once of course."

The first amended complaint is stricken by the Court as not having been filed in conformity with the laws of this state or any order of this Court. Striking the first amended complaint renders the original complaint the operative pleading, meaning that the demurrer and motion to strike are now moot.

The Court further notes that the parties stipulated to extend the time for all the parties to respond to the first amended complaint. (Decl. of Brande Gustafson, ¶15, exhibit B.) The parties are advised that in the future, they must obtain permission from the Court to enlarge the time for answer or demurrer, although in The Superior Court of Fresno County, this may be accomplished by way of an ex parte application/stipulation for an order without the necessity of a hearing. (Code Civ. Proc., § 473, subd. (a); see also, Cal. Rules of Court, rule 2.20; The Superior Court of Fresno County, Local Rules, rule 2.7.2(2).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 1/15/13
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Smith v. CDCR et al.***
Superior Court Case No. 11CECG04267

Hearing Date: **January 17, 2013 (Dept. 502)**

Motion: Unopposed Demurrer to Complaint

Tentative Ruling:

To sustain the demurrer without leave to amend as to defendants Garcia and Sturkey only. Code Civ. Proc. § 430.10(e). Prevailing parties are to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to the demurring defendants.

Explanation:

Compliance with the claim filing requirements (i.e., Gov. Code §§ 910, 912.4, 912.8 and 945.4) is an essential element of a damages cause of action against a government entity. Consequently, plaintiff must allege facts demonstrating or excusing claim-filing compliance; otherwise, the complaint is subject to general demurrer for failure to state a cause of action. *State of Cal. v. Superior Court* (2004) 32 Cal.4th 1234, 1239.

The complaint alleges that plaintiff is required to comply with a claims statute and that he is excused from complying because defendants are "not a public entity." Complaint ¶ 9. But the complaint clearly alleges that all individual defendants are employees of the California Department of Corrections and Rehabilitation. The claim filing requirement applies to any lawsuit for damages against the State or its employees. Gov. Code §§ 911.2, 950.2, 945.4.

Claims must be filed within 6 months of the accrual of the cause of action. Gov. Code § 911.2(a). The court grants defendants' request for judicial notice of records certified by the Custodian of Records for the Government Claim Program, showing that plaintiff filed a claim on 11/23/11. See *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750 [taking judicial notice of absence of a claim in the State Board of Control's records]. This was more than 6 months after the date of the incident on 3/15/11, and was therefore untimely. (Note, the claim file includes a letter by plaintiff stating that he had not filed any claim. Either way, plaintiff failed to comply with the claim presentation requirements – either he filed a late claim, or he filed no claim at all.)

The demurrer will be sustained without leave to amend. Normally, even if a demurrer is sustained, leave to amend is routinely granted, where a fair opportunity to correct any defect has not been given. *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227. In the case of an original complaint, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend is an abuse of discretion, irrespective of whether leave to amend was requested or not. *McDonald v.*

Superior Court (1986) 180 Cal.App.3d 297, 303-304. Even so, absent a request for leave to amend, no abuse of discretion will be found unless a potentially effective amendment is both apparent and consistent with plaintiff's theory of the case. *Camsi IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542. But the burden is on the plaintiff to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the pleading. *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.

Here, it is clear that the complaint is incapable of amendment. Not only was the claim filed late (or not filed at all), but the deadline has passed for plaintiff to seek leave to file a late claim. Plaintiff had one year from the date of the incident to apply for leave to present a late claim. Gov. Code § 911.4(b). That deadline passed almost six months ago.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 10/30/2012.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Torigian v. Shmavonian et al.***
Superior Court Case No. 10CECG03800

Hearing Date: January 17, 2012 (Dept. 502)

Motion: Debra Berg's Motion for Attorney's Fees

Tentative Ruling:

To deny.

Explanation:

Section 1717

Generally, in California, each party to a lawsuit must pay its own attorney fees except where a statute or contract provides otherwise. (Code Civ. Proc., § 1021.) Civil Code section 1717 is one such statute. It states, in subdivision (a):

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

(Civ. Code § 1717, subd. (a).)

"The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions. [Citation.] Courts have recognized that section 1717 has this effect in at least two distinct situations. [¶] The first situation in which section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is 'when the contract provides the right to one party but not to the other.' [Citation.] In this situation, the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, 'whether he or she is the party specified in the contract or not.' [Citation]." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610–611.)

"The second situation in which section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation 'by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.' [Citation.]" (*Santisas, supra*, 17 Cal.4th at p. 611.) This includes cases in which "a party is sued on a contract providing for an award of attorney fees to which he is not a party." (*Topanga v. Toghia* (2002) 103 Cal.App.4th 775, 780.)

"In Any Action on a Contract"

California courts construe the term 'on a contract' liberally." (*Turner v. Schultz* (2009) 175 Cal.App.4th 974, 979.) In determining whether a prevailing party prevailed "on the contract," "the court should consider the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party's recovery. [Citations.]" (*Hyduke's Valley Motors v. Lobel Financial Corp.* (2010) 189 Cal.App.4th 430, 435; *Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 377.)

Berg cites *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316 for the proposition that all the causes of action alleged against her were causes of action "on a contract," namely the Deed of Trust. She claims she was alleged to have claimed a right or interest in the property and that she noticed a foreclosure sale pursuant to the power of sale under the Deed of Trust. In *Kachlon*, the appellate court affirmed an award of attorney's fees under section 1717 the purchasers of a home and against the sellers and the Trustee of a Deed of Trust, finding that declaratory and injunctive relief and quiet title, are "action[s] on a contract" within the meaning of section 1717, subdivision (a).

The first, second, and sixth causes of action against Berg were based "on" the Deed of Trust as to Berg. However the tort causes of action were not. Section 1717 generally does not apply to noncontract causes of action, such as "fraud [based claims] arising out of a contract" that contains an attorney fees provision. (*Stout v. Turney* (1978) 22 Cal.3d 718, 730.) "If an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims. [Citation.]" (*Santisas, supra*, 17 Cal.4th at p. 615.) In *Topanga v. Toghia, supra*, 103 Cal.App.4th 775, the appellate court held that section 1717 's reciprocity provisions did not apply to nonsignatories attempting to recover fees incurred in defending noncontract causes of action. In *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, the court found that the language of the operative contract demonstrated that a real estate broker was not a party to the sales agreement with the relevant attorney's fees provision. The court further concluded that the plaintiffs' claims against the broker "sound[ed] in tort," and therefore section 1717 did not apply.

Non-Signatory

Berg is not a signatory on the Deed of Trust or a party to it. However, this bare fact does not preclude her recovery of attorney's fees for claims on a contract. Section 1717, provides that reciprocal fees may be awarded "to ... the party prevailing on the contract" "whether he or she is the party specified in the contract or not." Indeed, section 1717 includes "any action where it is alleged that a person is liable on a contract, whether or not the court concludes he is a party to that contract." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128; but see *Topanga v. Toghia, supra*, 103 Cal.App.4th 775; *Super 7 Motel Associates v. Wang, supra*, 16 Cal.App.4th 541 [non-signatories cannot get fees for non-contract causes of action].)

Defense of Proving the Contract was Inapplicable to Berg

The fact that the contract was inapplicable as to Berg does not bar her claim for attorney's fees. The California Supreme Court has explained that section 1717 "would fall short of th[e] goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not parties to the alleged contract or that it was never formed." (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 870.) "Because these arguments are inconsistent with a contractual claim for attorney fees under the same agreement, a party prevailing on any of these bases usually cannot claim attorney fees as a contractual right. If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral—regardless of the reciprocal wording of the attorney fee provision allowing attorney fees to the prevailing attorney—because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision. To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract ... section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." (*Santisas, supra*, 17 Cal.4th at p. 611.)

Reciprocity

Berg cannot establish this critical element. Plaintiffs would never have been able to recover attorney's fees from Berg had they prevailed against her. "[A] party is entitled to attorney fees under section 1717 'even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, *if the other party would have been entitled to attorney's fees had it prevailed.*' [Citations.]" (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 870 (emphasis added).) " '[T]he following rule may be distilled from the applicable cases: A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed.' [Citation.]'...." (*Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 341.) A party's "mere request for attorney's fees alone created a reciprocal right in the [opposing party] to such fees." (*Alhambra Redevelopment Agency v. Transamerica Financial Services* (1989) 212 Cal.App.3d 1370, 1381.) Instead, "a reciprocal right is only created where the party alleging he or she is entitled to attorney's fees '*actually* would have been entitled to receive them if he or she had been the prevailing party.' " (*Ibid.*)

Here, the attorney's fees clause in the Deed of Trust reads as follows:

To protect the security of this Deed of Trust, Trustor agrees:

[¶]

[¶]

(3) To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses, including the cost of evidence of title and attorney's fees in

a reasonable sum, in any action or proceeding in which Beneficiary or Trustee may appear, and in any suit brought by Beneficiary to foreclose this Deed.

It is undisputed, based on Plaintiffs' own verified pleadings, that Berg was not the Trustee; WT Capital was. As such, and as this court has previously ruled, plaintiffs could not have enforced the attorney's fees provision in the Deed of Trust against Berg, who is merely an employee and officer of the Trustee.

The Deed of Trust further provides, in paragraph (8): “[t]hat this Deed applies to, inures to the benefit of and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors, and assigns. ...” It does not apply to employees.

Accordingly, because plaintiffs could not have recovered attorney's fees from Berg, section 1717 does not allow Berg to recover them from plaintiffs.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 1/16/13.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***In re Yakenny Vasquez-Radillo***
Superior Court Case No. 12CECG03278

Hearing Date: January 17, 2013 (**Dept. 502**)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

For each minor, counsel is ordered to forward to the depository a Receipt and Acknowledgment on Judicial Council form MC-356, along with a signed copy of the Order to Deposit. Once the depository has signed the Receipt, counsel shall file the completed Receipt with the court, within 30 calendar days of the clerk's service of the minute order.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 1/15/13.
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***Randall Burchfield v. Clovis RV, Inc., et al.***
Court Case No. 10CECG02398

Hearing Date: **January 17, 2013 (Dept. 502)**

Motion: 1) Plaintiff's Motion to Correct and Confirm Arbitration
Award
2) Plaintiff's Motion for Leave to File Second Amended
Complaint

Tentative Ruling:

To grant the motion to correct and confirm the arbitration award. The award is corrected to clarify that the purchase contract between plaintiff and defendant Clovis RV, Inc., is rescinded and unenforceable. Plaintiff is awarded fees on the motion in the amount of \$1,605.50. The form of judgment submitted with the motion will be signed.

To grant the motion for leave to file the Second Amended Complaint, with plaintiff granted 10 days' leave to file same. The time in which the complaint can be amended will run from service by the clerk of the minute order.

Explanation:

Motion to Correct/Confirm Arbitration Award:

Pursuant to CCP §1286.6(c), on noticed motion the court may modify or "correct" an award for defects in the *form* of the award that do not affect the merits of the controversy, for instance to include an *inadvertently omitted ruling*. [*A.M. Classic Const., Inc. v. Tri-Build Development Co.* (1999) 70 Cal.App.4th 1470—affirming that the arbitrator *could* make such a correction; *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865, 879--accord]

Costs incurred in judicial proceedings to enforce an arbitration award are recoverable by the prevailing party as a matter of right. [CCP §1293.2] Thus, plaintiff's request for attorney's fees and costs will be granted, with the amount awarded lowered to account for the fact that no opposition to the motion itself, as opposed to the request for attorneys' fees, was filed, no reply brief was filed and no appearance appears to be necessary.

Motion for Leave to Amend Complaint:

It is premature to decide if the arbitration award has any preclusive effects on plaintiff's claims against the remaining defendants. Generally, the court will not consider the validity of the proposed amended pleading in considering whether or not to allow it to be filed, since grounds for demurrer or motion to strike are premature. [See

Kittredge Sports Co. v. Sup.Ct. (Marker, U.S.A.) (1989) 213 Cal.App.3d 1045, 1048, 261 Cal.Rptr.857, 859] The preferable practice is to permit the amendment and allow the parties to test the legal sufficiency by demurrer or other appropriate motion. [California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal.App.3d 274, 281, *disapproved of on other grounds by* Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal.4th 390]

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 1/16/13.
(Judge's initials) (Date)

(6)

Issued By: _____ **MWS** _____ **on** _____ **1/16/2013** _____
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: **Gonzalez v. Northwest Medical Group**
Superior Court Case No. 11CECG04214

Hearing Date: January 17, 2013 (**Dept. 503**)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To deny without prejudice. Petitioner may file a verified amended petition that cures the defects listed below. Petitioner must obtain a new hearing date for the amended petition. (The Superior Court of Fresno County, Local Rules, rule 2.8.4.)

Explanation:

First, the petition is unclear as to who the settling Defendants are. Because Plaintiff has not yet filed a notice of settlement with the court as required by California Rules of Court, rule 3.1385, the court assumes that not all the parties have settled. (Petition, ¶11.)

Ordinarily, the Court will not permit the funds to be paid directly to the parent or guardian ad litem, but will require the net proceeds to be deposited into a blocked account payable to the order of the minor when he turns 18.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS **on** 1/16/2013.
(Judge's initials) (Date)

(19)

Tentative Ruling

Re: ***Celaya v. PPG Industries***
Superior Court Case No. 11CECG01054

Hearing Date: January 17, 2013 (Dept. 503)

Motion: by plaintiffs for class certification and preliminary approval of class settlement

Tentative Ruling:

To grant class certification for settlement purposes. To address the few remaining concerns about the settlement with counsel at the hearing.

Explanation:

1. Certification

The Court incorporates its ruling on August 21, 2012 in this case for historical perspective. The need to scrutinize the evidence to ensure it establishes a class is heightened in the settlement context as to all requirements but for manageability for trial. *Amchem Products v. Windsor* (1997) 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed 2d 689. Such requirements ensure that a class definition is not overbroad and ensure due process for absent class members. *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812.

The burden of proof for a plaintiff/cross-complainant asserting class certification is appropriate is preponderance of the evidence. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 322. See also *Richmond v. Dart Industries, Inc.* (1981) 29 Cal. 3d 462, 470, holding that a ruling on certification is subject to the "substantial evidence" test.

Moving parties have met those tests, "establish[ing] the existence of both an ascertainable class and a well-defined community of interest among class members. The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Medraza v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 96-97.

The four named representatives cover the entire time period for which a class certification is sought. All worked in "continuous operations" jobs during that period, each alleges they were not provided with off-duty meal periods, and each alleges were not paid premium pay for the lack of such a meal period. They all also allege they missed break periods.

All four served as union officers at some time during the class period, and had access to materials they contend show a company-wide policy of requiring

employees in continuous operations to be “on-call” and on the premises during lunch breaks. Their descriptions of the length of meal periods are confirmed by the head of human resources for defendant, as well as by the collective bargaining agreements provided; liability is hotly disputed.

“the adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members.” *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669. “Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class.” *McGee v. Bank of America* (1976) 60 Cal. App. 3d 442, 487.

Counsel have demonstrated substantial experience in both employment litigation and class action litigation. The contents of the Court's file for the instant matter also show counsel are well qualified to conduct this case. The proposed class representatives are motivated employees who have already served class members as current and past Union officials, and gathered documentation showing the pay rates, work schedules, and employment conditions of their fellow class members. They have sacrificed any enhancement fees for their service as class representatives, and those with longer service times and seniority have agreed to a settlement which provides one pay rate for all, even if they would be entitled to more money if the actual pay rates were used.

The following class is therefore certified: “all current and former hourly production and maintenance employees of PPG who worked a ‘continuous rotation’ shift of more than five hours since April 1, 2007 at the Fresno Plant.” The named plaintiffs are appointed as class representatives, and their counsel as class counsel.

2. Settlement

a. In General

Class counsel have adequately set forth the basis for settlement and for focusing on the meal break/rest period claims and foregoing the waiting time and adequate wage statement claims, as required by *Clark v. ARS* (2009) 175 Cal. App. 4th 785 and *Kullar v. Foot Locker* (2008) 168 Cal. App. 4th 116. The legal authority for limiting premium pay to one missed meal period a day is set forth -- *UPS v. Superior Court* (2011) 196 Cal. App. 4th 57, 69. The concerns raised by the grant of review in *Duran v. U.S. Bank*. (2012) 2012 WL 366590 and the impact of the Collective Bargaining Agreements furnish a reasonable basis for settling the matter at a figure representing 60% of the total damage for the missed meal period claims. The settlement represents a certain and substantial cash payment to those who provide the required claim form. The amount of fees and costs sought is appropriate for preliminary approval.

b. Problems in the Settlement Agreement

There remain a few problems with the settlement documents themselves. The settlement agreement and the class notice disagree on the period in which an objection may be filed. The settlement agreement calls for an unreasonably short

period of 30 days, while the notice to the class calls for an acceptable period of 45 days. There is a requirement that any objection be served on the Settlement Administrator, which is to be defendant. That need be omitted; service on the parties' counsel is sufficient.

Paragraph 58 sets up the Court as the trier of any disputes between class members and defendant as to the number of work weeks. Such a procedure would render entry of judgment questionable, and the Court suggests a private arbitration process would better serve finality. The point of a class procedure is that it permits the court system to handle the claims of many in one action; individual trials of disputes over settlement payments does not serve that purpose.

Paragraph 64 states that "Each Participating Class Member shall cooperate with Defendant and provide documentation as requested to demonstrate such payment should any taxing authority challenge the allocation of settlement payments." Imposing a continuing burden on absent class members to provide defendant with "documents as requested" is antithetical to the purpose of a class action – to relieve individual class members from the burden of active participation, but for individual claim forms where warranted.

See *Baldwin & Flynn v. National Safety Assoc.* (N.D. Cal. 1993) 149 F.R.D. 598, 61: "The purpose of the [class action] device is not only to relieve the courts of the burden of participating in the action, it is also to relieve the absent members of the burden of participating in the action."

That sentence could require a class member to turn over a tax return or such. Tax returns are accorded a very strong privilege under California law. *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509; *Sav-On Drugs, Inc. v. Superior Court* (1975); *Schnabel v. Superior Court* (1993) 5 Cal. 4th 704, and *Fortunato v. Superior Court* (2003) 114 Cal. App. 4th 475. "Documentation as requested" could also result in privacy being breached. The waiver of privilege is not even addressed in the class notice. This sentence need be removed.

Paragraph 66 is the release, which purports to cover all claims "as they relate to claims included in the Complaint." That is too broad. Newberg on Class Actions notes that "A settlement may properly prevent class members from asserting claims relying upon a legal theory different from that relied upon in the class action complaint, but depending upon the **same set of facts**." See same at section 12:15, in the Chapter for "Drafting the Settlement Agreement," emphasis added.

"The Court may approve a settlement which releases claims not specifically alleged in the complaint as long as they are based on the same factual predicate as those claims litigated and contemplated by the settlement." *Strube v. Am. Equity Inv. Life Ins. Co.* (M.D. Fla. 2005) 226 F.R.D. 688, 700. "A federal court may release not only those claims alleged in the complaint, but also a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented . . ." *Class Plaintiffs v. Seattle* (9th Cir. 1992) 955 F.2d 1268, 1287.

Paragraph 86(iv) provides that class members are enjoined from bringing claims “relating to or arising out of the allegations raised in the class action.” That language is problematical for the same reasons. The class notice also contains this language. It must be changed to conform to the law.

Paragraph 88 bars use of the settlement or any documentation pertaining thereto, by class members as evidence, including in criminal, civil, or administrative cases. Class members can sue class counsel for malpractice, and certainly such documents might be admissible in such a matter. See *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4th 930. The State Bar might have a beef with an attorney herein, in an administrative proceeding. While the settlement cannot be used to show that defendant is liable on the complaint, it is not appropriate to restrict use of the material in other cases where it might be needed.

Contracts to secrete evidence cannot be used to bar production of witnesses, testimony, documents or any other form of evidence in response to discovery. Private parties are not allowed to create privileges by contract; this function is reserved completely to the legislative body under California law. California Evidence Code § 911; *Schnabel v. Superior Court* (1993) 5 Cal. 4th 704, 720, fn. 4,); *Valley Bank v. Superior Court* (1975) 15 Cal. 3d 652, 656). The United States Supreme Court has confirmed that private parties do not have the power to shield information from disclosure that is otherwise not privileged. *Baker v. General Motors Corp* (1998) 522 U.S. 222. See also *McGinty v. Superior Court* (1994) 26 Cal. App. 4th 204 - one court's entry of protective order did not, and could not, work to bar forever discovery of the protected evidence in other cases.

All language in paragraph 88 from “nor shall this Agreement, the Settlement . . . to the end of the paragraph need be omitted.

c. Problems in the Class Notice

Paragraph 5 of same, on page 3, has the overbroad release language. Paragraph 4 omits the fact that costs are also included in the \$150,000 figure. Paragraph E on page 4 does provide for 45 days to file an objection. It should remove the requirement that an objection be served on the settlement administrator. Paragraph G on page 5 has the wrong address for the Court.

d. Problems with the Claim Form

This improperly includes a release, which would have the effect of gathering individual releases before the Court gives final approval. Inclusion of proper release language in the notice is sufficient.

It also requires that the class member sign the form under penalty of perjury “that you have read this Claim Form and agreed to its terms.” The information comes from defendant's own records; there is no need to have verification. Comments about perjury tend to dissuade class members from participating. Further, the

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